

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

FRANCISCO CASTILLO-CELAYA	§	
	§	
v.	§	2:16-CV-0026
	§	
UNITED STATES GOVERNMENT	§	

**REPORT AND RECOMMENDATION TO DISMISS
MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE**

Defendant has filed with this Court a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. For the reasons articulated below, the undersigned recommends the habeas corpus petition be DISMISSED.

Defendant states in his motion to vacate he appealed his conviction and sentence to the United States Fifth Circuit Court of Appeals and, on January 13, 2016, that Court denied his appeal. A review of the Fifth Circuit website, however, shows defendant's appeal to be pending. It appears that on January 13, 2016 defense counsel filed an *Anders* brief and no ruling by the Fifth Circuit has been made.

As stated in *Bazemore v. United States*, 2016 WL 368004 at *1 (N.D. Tex. Jan. 29, 2016), "A motion to vacate sentence under 28 U.S.C. § 2255 will not be entertained during the pendency of a direct appeal, inasmuch as the disposition of the appeal may render the motion moot." citing *United States v. Fantozzi*, 90 F. App'x 73, 74 (5th Cir. 2004) (quoting *Welsh v. United States*, 404 F.2d 333, 333 (5th Cir. 1968), *abrogated on other grounds*, *United States v. Ortega*, 859 F.2d 327, 334 (5th Cir. 1988)). A "defendant's conviction becomes final for limitations purposes under the AEDPA when both the conviction and sentence become final by the conclusion of direct review of

the expiration of time for seeking such review.” *United States v. Messervey*, 269 F. App'x 379, 381 (5th Cir. 2008) (per curiam). As Petitioner's conviction is not final, this Court cannot consider the merits of Petitioner's § 2255 motion at this time.

RECOMMENDATION

It is the RECOMMENDATION of the United States Magistrate Judge to the United States District Judge that the application for a writ of habeas corpus filed by defendant FRANCISCO CASTILLO-CELAYA be DISMISSED WITHOUT PREJUDICE.

INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of this Report and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED this 29th day of February 2016.


CLINTON E. AVERITTE
UNITED STATES MAGISTRATE JUDGE

*** NOTICE OF RIGHT TO OBJECT ***

Any party may object to these proposed findings, conclusions and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the “entered” date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(c), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). **Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed** as indicated by the “entered” date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d).

Any such objections shall be made in a written pleading entitled “Objections to the Report and Recommendation.” Objecting parties shall file the written objections with the United States

District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1), *as recognized in ACS Recovery Servs., Inc. v. Griffin*, 676 F.3d 512, 521 n.5 (5th Cir. 2012); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).